86 - 1354

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1986

MAYAJA, INC., ORART, S.A. TEXAS, INC., ELIAS SHEINBERG, AND MARCIA SHEINBERG,
Cross-Petitioners

v.

SHEARSON LEHMAN BROTHERS, INC., JOSEPH F. BODKIN, AND NICHOLAS BUSTAMANTE,
Cross-Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether the United States Court of Appeals for the Fifth Circuit erred in permitting the record on appeal to be supplemented with documentary evidence that had not been offered in the trial court.

2. Whether claims brought under Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), are arbitrable.

List of Parties

The parties to the proceeding in the Court of Appeals were the Cross-Petitioners:

1. Mayaja, Inc., a Cayman Islands Corporation;

2. Orart, S.A., Texas, Inc., a Texas corporation;

3. Elias Sheinberg, a resident of Mexico City, Mexico; and

4. Marcia Sheinberg, the wife of Elias Sheinberg and also a resident of Mexico City, Mexico.

The officers, directors and shareholders of Mayaja and Orart are all members of the family of Salomon Smilovici, a resident of Mexico City, Mexico. Marcia Sheinberg is the stepdaughter of Salomon Smilovici.

Also before the Court of Appeals were the Cross-Respondents:

1. Shearson Lehman Brothers, Inc.;

2. Nicolas Bustamante; and

3. Joseph F. Bodkin.

Cross-Respondent Shearson Lehman Brothers, Inc., in its petition for certiorari, has stated that it is a wholly owned subsidiary of Shearson Lehman Brothers Holdings Inc. and that Shearson Lehman Brothers Holdings Inc. is a wholly owned subsidiary of American Express Company. Further, Shearson

Lehman Brothers, Inc. has stated that the following are non-wholly owned subsidiaries and affiliates:

Active Subsidiaries:

(a) Boston Hambro Corp.
(b) Boulevard Investors Inc.
(c) Boulevard Real Estate Corp.
(d) Burlington Investors Inc.
(e) E. B. Realty
(f) Lombard Realty Corporation
(g) Lowell Investors Inc.
(h) Lowell Real Estate Corp.
(i) Shearson Dat-Cheong Company Limited
(j) Shearson Lehman/Amex Finanz A.G.
(k) Shearson/KM, Inc.
(l) Shearson/NGP Inc.

Inactive Subsidiaries:

(a) Genex Insurance Brokerage Ltd.
(b) Mideast-American, Inc.

Affiliates:

(a) Banque Eurofin
(b) Barony Company Ltd.
(c) California S.A.
(d) Carnegie Capital Management Company
(e) Shearson Financial Services of Oklahoma, Inc.
(f) Shearson Financial Services of Texas, Inc.
(g) Shearson Lehman Brothers SARL
(h) Intermodal Equipment Associates
(i) KCC Syndicate Managers, Inc.
(j) McLeod Young Weir Limited
(k) New World Corporation
(l) Rex Moor Properties Incorporated
(m) Russell Energy Inc.
(n) Sovran Energy Corp.

Shearson Lehman Brothers, Inc. has also stated that the non-wholly owned subsidiaries of Shearson Lehman Brothers Holdings Inc. are as follows:

(a) American Express Asset Management Limited
(b) American Express Asset Management N.V.
(c) American Express Asset Management S.A.
(d) American Express U.K. Holding Company Inc.
(e) Dr. Pepper Holding Company
(f) FGIC Corporation
(g) Kuhn Loeb Lehman Brothers International B.V.
(h) Lehman Brothers International UK Ltd.
(i) Lehman International Finance N.V.
(j) Lehman Overseas N.V.
(k) LBKL 82-1 Investors Inc.
(l) Shearson Lehman Broadgate North Inc.
(m) Shearson Lehman Broadgate South Inc.
(n) Shearson Lehman Brothers Limited
(o) The McLeod Young Weir Corporation.

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Cross-Petitioners, Mayaja, Inc., Orart, S.A. Texas, Inc., Elias Sheinberg, and Marcia Sheinberg, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 24, 1986.

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 803 F.2d 157 and is reproduced herein at Appendix A. Cross-Respondents' motion to supplement the appellate record and Cross-Petitioners' response to that motion are reproduced at Appendix B and Appendix C. The Fifth Circuit's order permitting the supplementation of the appellate record is reproduced at Appendix D. The motion, response, and order were not reported.

The Orders of the United States District Court for the Western District of Texas (Garcia, D.J.) denying Cross-Respondents' motions to stay and compel arbitration are reproduced herein at Appendix E. Those orders were not reported.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982). This is a cross-petition filed pursuant to Sup. Ct. R. 19.5. The Cross-Respondents' petition for certiorari was filed in this Court on January 14, 1987, and was received by Cross-Petitioners' counsel on January 16, 1987. This cross-petition is being filed not more than 30 days thereafter.

Constitutional Provisions and Statutes Involved

1. U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.

Statement of the Case

Cross-Petitioners filed their original complaint in the United States District Court for the Western District of Texas, San Antonio Division on July 11, 1985 complaining that they had suffered money damages as a consequence of Cross-Respondents' acts in violation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. On August 30, 1985, Cross-Respondents filed their first responsive pleadings in the form of a motion to dismiss and compel arbitration. That motion was denied by the District Court on September 20, 1985. A subsequent amended motion was denied on October 7, 1985. Thereafter, Cross-Respondents commenced their appeal to the Court of Appeals for the Fifth Circuit.

The record on appeal contained no proof of facts offered by the parties or findings of fact made by the Court. In fact, the record contained only the factual allegations of the parties which are in dispute. "Defendants' Motion to Dismiss and Compel Arbitration" and "Defendants' Motion to Reconsider Order Denying Defendants' Motion to Stay or Dismiss and Compel Arbitration and Amended Motion to Stay or Dismiss and Compel Arbitration," the denial of which they appeal, alleged agreements to arbitrate that were not offered into evidence, were not considered by the District Court, and were not properly before the Court of Appeals.

The Fifth Circuit Court of Appeals, on October 24, 1986, rendered its opinion and held that claims brought under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 of the Securities and Exchange Commission, 15 C.F.R. § 240.10b-5, were not arbitrable while claims brought under § 1964(c) of RICO, 18 U.S.C. § 1964(c), were arbitrable. Cross-Petitioners' application for a writ of certiorari is based upon that portion of the opinion rendered by the United States Court of Appeals for the Fifth Circuit which compelled the arbitration of the § 1964(c) claims.

Cross-Petitioners' allegations contained in their original complaint may be summarized as follows:

Cross-Petitioner Mayaja, Inc. ("Mayaja"), is a Cayman Islands corporation. Cross-Petitioner Orart, S.A. Texas, Inc. ("Orart") is a Texas corporation. The officers, directors and shareholders of both corporations are members of the family of Salomon Smilovici, a resident of Mexico City, Mexico. Cross-Petitioners Elias and Marcia Sheinberg are husband and wife and reside in Mexico City, Mexico. Marcia Sheinberg is Salomon Smilovici's stepdaughter.

Cross-Respondent Shearson Lehman Brothers, Inc. ("Shearson") is a Delaware corporation engaged in the securities brokerage business with an office in San Antonio, Texas. Cross-Respondent Joseph F. Bodkin ("Bodkin") managed that office and Cross-Respondent Nicholas S. Bustamante ("Bustamante") was a broker employed in that office during all periods material to this suit.

Mayaja, Orart, and the Sheinbergs maintained accounts with Shearson. At Bustamante's urgings, Mayaja and Orart entered into commodity trading agreements with Shearson. Thereafter, Bustamante purchased and sold silver contracts for the accounts of Mayaja and Orart. These transactions resulted in large unrealized losses which were incurred despite specific instructions that the losses to Mayaja were never to exceed $20,000 and the losses to Orart were never to exceed $10,000.

When Mayaja and Orart discovered the magnitude of the unrealized losses, they instructed Bustamante to immediately dispose of all silver contracts. Bustamante refused to do so and subsequently took delivery of the silver. Mayaja and Orart then instructed Bustamante to sell the silver in their accounts. Again, Bustamante refused to comply with their instructions. The unrealized losses increased as the price of silver fell. The unrealized losses were accompanied by margin calls. Bustamante satisfied these calls against Mayaja by selling certificates of deposit owned by Mayaja and applying the proceeds to the amounts called. These sales were without authority. When

Mayaja demanded an accounting of its certificates of deposit, Bustamante denied that they had been sold and provided Mayaja with false brokerage tickets indicating that the corporation still owned the certificates.

After margin calls exhausted all funds belonging to Mayaja and Orart, Bustamante forged the signatures of the Sheinbergs to a transfer authorization and illegally withdrew $39,700 from their account. Bustamante used these funds to meet Mayaja and Orart margin calls.

Although Bodkin was aware of these facts and was directly responsible for supervising and controlling Bustamante, he failed and refused to take any action to correct these transactions or discipline Bustamante. Instead, he attempted to cover up Bustamante's fraudulent actions and aided and abetted in the commission of his fraudulent actions.

Cross-Petitioners have sought relief under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

The Cross-Respondents generally deny all allegations of wrongdoing.

Summary of the Argument

The Fifth Amendment to the United States Constitution, U.S. Const. amend. V., guarantees civil litigants procedural due process, including the right to a hearing. This right was denied Cross-Petitioners by the Court of Appeals' order which permitted Cross-Respondents to supplement the appellate record with brokerage agreements which had never been offered as evidence in the District Court, were never considered by the District Judge, and with respect to which Cross-Petitioners were never afforded an opportunity to challenge. Relying on the arbitration clauses contained in the brokerage agreements, the Fifth Circuit held that Cross-Petitioners' claims under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act were arbitrable. The Fifth

Circuit's analysis of RICO's legislative history is flawed by its failure to consider the "Statement of Findings and Purpose" which accompanied the statute.

Reasons for Granting the Writ

I.

The Fifth Circuit's order permitting Cross-Respondents to supplement the record on appeal with documentary evidence that was not offered in the District Court, was not considered by the District Court, and with respect to which Cross-Petitioners were not afforded an opportunity to challenge violated Cross-Petitioners' constitutional right to procedural due process guaranteed by U.S. Const. amend. V.

The brokerage agreements before the Court of Appeals which Cross-Respondents claimed constituted the agreements of Cross-Petitioners to arbitrate this dispute were not seen by the District Court until after it denied the motion to stay and compel arbitration. After Cross-Respondents commenced their appeal of the District Court's order, Cross-Respondents recognized their failure to introduce any evidence of an agreement to arbitrate. In an attempt to cure the evidential insufficiency, Cross-Respondents moved to supplement the record then on appeal with the brokerage agreements containing arbitration clauses on which they relied. Because these agreements were not introduced in the District Court, Cross-Petitioners were not afforded an opportunity to challenge them. Nevertheless, the Fifth Circuit permitted their untimely introduction.

Cross-Respondents' assertion of their right to arbitrate Cross-Petitioners' claims is an equitable defense. *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 at note 1 (5th Cir. 1962). Because Cross-Respondents asked the District Court to take judicial action and stay its proceeding pending arbitration of Cross-Petitioners' claims, Cross-Respondents had the burden of producing evidence to support such right. *Wilkins v. American Export Isbrandtsen Lines, Inc.*, 446 F.2d 480, 484 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972). By asserting their right to a

stay, the Cross-Respondents bore the burden of proving the contract which would have entitled them to arbitrate Cross-Petitioners' claims. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979). Because the Cross-Respondents failed to offer proof of any agreement entitling them to arbitrate Cross-Petitioners' claims, the District Court properly denied their motion to stay or dismiss and compel arbitration.

On appeal, the Fifth Circuit permitted the introduction of the agreements, and, relying on them, held Cross-Petitioners' RICO claims to be arbitrable. Had Cross-Petitioners been afforded an opportunity to challenge the agreements, they would have shown that the agreements were unenforceable contracts of adhesion executed at the "x" at the instructions of Cross-Respondent Bustamante. They would have shown that Salomon Smilovici, who signed the brokerage agreement on behalf of Mayaja, did not read or speak the English language. Cross-Petitioners would also have shown that the arbitration clauses violated Rule 15c2-2 of the Securities and Exchange Commission, 17 C.F.R. § 240.15c2-2, and were, therefore, void. 15 U.S.C. § 78cc(b).

This Court recognized in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. _____, 87 L.Ed.2d 444, 459, that arbitration agreements may be tainted.

> A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. [Citation omitted.] Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause — that the agreement was "[a]ffected by fraud, undue influence, or overweening bargaining power;" that "enforcement would be unreasonable and unjust;" or that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." The Bremen, 407 US, at 12, 15, 18, 32 L Ed 2d 513, 92 S Ct 1907. But absent such a showing — and none was

attempted here — there is no basis for assuming the forum inadequate or its selection unfair.

In this proceeding, the Fifth Circuit's order permitted it to consider as evidence the arbitration clauses contained in brokerage agreements but precluded Cross-Petitioners from challenging them. Cross-Petitioners were thus prevented from showing that "the forum was inadequate or that its selection was unfair."

The Fifth Circuit's admission into evidence of the brokerage agreements was manifestly unjust and in violation of Cross-Petitioners' right to a hearing. Absent those agreements, there was no evidence of any agreement to arbitrate. By admitting those agreements into evidence on appeal, Cross-Petitioners were denied an opportunity to contest them. The procedure followed by the Fifth Circuit violated Cross-Petitioners' due process rights guaranteed by U. S. Const. amend. V. *Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961).

II.

The Fifth Circuit's holding that claims brought under Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c), are arbitrable conflicts with decisions by the First, Second, Third and Eleventh Circuits and presents an important federal question with significant impact on the enforcement of the criminal laws.

At issue is the arbitrability of claims asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968. Section 1964(c) affords an injured party a private cause of action to recover damages resulting from a violation of the statute. Cross-Petitioners have brought suit in the United States District Court to recover damages incurred as a result of alleged RICO violations. Cross-Respondents would have these claims referred to arbitration pursuant to the arbitration clauses contained in the brokerage agreements.

The United States Arbitration Act, 9 U.S.C. §§ 1-14, permits parties to contract for the arbitration of their disputes:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 3 of the act permits federal courts to stay proceedings that are referrable to arbitration. Section 4 empowers federal courts with authority to order a party to arbitrate a dispute arising out of a written agreement for arbitration. The Court of Appeals held that, under the Arbitration Act, Cross-Petitioners' claims must be submitted to arbitration.

In *Wilko v. Swan*, 346 U.S. 427, 431 (1953), this Court recognized the "desirability of arbitration as an alternative to the complications of litigation." Subsequently, this Court recognized the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration . . . ." *Id.* at 24-25. But this Court's enforcement of the Arbitration Act has not been open-ended:

> [Not] all controversies implicating statutory rights are suitable for arbitration . . . . Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by the Act, it is the congressional intention expressed in some other statutes on which the courts must rely to identify any category of

> claims as to which agreements to arbitrate will be held unenforceable.

Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., ___ U.S. ___, 105 S.Ct. 3346, 87 L.Ed.2d 444, 456 (1985).

Although this Court has enunciated a policy favoring the enforcement of arbitration agreements, it has not hesitated to override those agreements when confronted with a contrary congressional intention, be it express or implied.

The intention of Congress to prohibit the enforcement of agreements to arbitrate disputes arising out of the Securities Act of 1933 was found by this Court in *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, this Court relied on the language of § 14 of the Securities Act, 15 U.S.C. § 77n, the "anti-waiver clause," in finding that Congress had reserved for federal court adjudication claims arising out of the Securities Act. Even when the intention to exclude statutory claims from arbitration could not be found in the express language of the statute, this Court has found such an intention through statutory implication. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), this Court held that a provision in a collective bargaining agreement requiring arbitration of disputes arising out of Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e-2000e-17, was not enforceable.

> Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver. *See Wilko v. Swan*, 346 U.S. 427, 98 L.Ed. 168, 74 S.Ct. 182 (1953).

415 U.S. at 51-52.

Inherent in this Court's holding was recognition of the limitations of the arbitral process:

> Arbitral procedures, while well suited to the resolution of contractural disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. . . . Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. [Citations omitted.] And as this Court has recognized, "[a]rbitrators have no obligation to the court to give their reasons for an award." [Citations omitted.] Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

415 U.S. at 57-58.

Thus, even while harboring no "suspicion of the desirability of arbitration and of the competence of arbitral tribunals," *Mitsubishi*, 87 L.Ed.2d at 455, this Court has refused to require the arbitration of statutory claims when Congress has indicated a different intention.

RICO contains no "anti-waiver" clause comparable to § 14 of the Securities Act. But the absence of express language is not determinative. "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from the text or legislative history." *Mitsubishi*, 87 L.Ed.2d at 456. Fortunately the congressional

intent is immediately apparent. The "Statement of Findings and Purpose" which accompanied the statute provided:

> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools to the evidence gathering process, by establishing new penal prohibitions, and by providing *enhanced sanctions* and *new remedies* to deal with the unlawful activity of those engaged in organized crime.

Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, *reprinted in* 1970 U.S. Code Cong. & Ad. News 1073. (Emphasis added.)

Thus, the express purpose of Congress in enacting RICO was not the granting of a private remedy but the imposition of civil and criminal penalties to eliminate racketeering activity from the United States. Although § 1964(c) of the statute permitted a private remedy for "any person injured in his business or property by reason of a violation of the [statute]," the public purpose articulated by Congress was paramount. This Court has recognized the public function of § 1964(c): "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. ___, 87 L.Ed.2d 346, 357 (1985). In enacting § 1964(c), Congress offered the carrot of treble damages to encourage private enforcement of criminal laws and, at the same time, admonished persons engaging in racketeering activities that if convicted they would feel the stick of treble damages. Thus, even though the penalties flow from racketeer to victim, the statute serves the public purpose of eliminating crime.

The arbitrability of RICO claims has been considered by the First, Second, Third, Fifth, and Eleventh Circuits. In *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291 (1st Cir. 1986), the First Circuit held that RICO claims brought under §1964(c) are not arbitrable because they are brought pursuant to a private right of action afforded by Congress for the purpose of eliminating organized crime:

> Thus, in light of the arguable parallels between criminal and civil RICO proceedings, and given the congressional policy of erradicating organized crime through the express use of a private right of action, we believe the congressional intent to have been one of precluding arbitration and limiting determinations of liability under this statute to the sole province of Article III courts.

806 F.2d at 298.

In *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 55 U.S.L.W. 3197 (U.S. October 6, 1986) (No. 86-44), the Second Circuit held that 1964(c) claims are not arbitrable, citing its own precedent in *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). *American Safety* held that Sherman act claims were not arbitrable because the statute was "designed to promote the national interest in a competitive economy." The Second Circuit in *McMahon* recognized that *American Safety* had been criticized by the Supreme Court in *Mitsubishi*, 87 L.Ed.2d at 458-61, but read the reasoning of *Mitsubishi* as limited to the international arena. 788 F.2d at 98.

The Eleventh Circuit, in *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986), also held RICO claims to be non-arbitrable. There, the predicate offenses were violations of the Securities Act and the Securities Exchange Act. Because those offenses were non-arbitrable under *Wilko v. Swan, supra*, it held that the RICO claims were similarly non-arbitrable.

In *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986), the Third Circuit held that RICO claims predicated on violations of § 10(b) of the Securities Exchange Act were non-arbitrable because the § 10(b) claims were themselves not arbitrable. A different opinion was reached in connection with RICO offenses predicated on mail and wire fraud statutes. The Court held that those RICO claims were arbitrable because the mail and wire fraud statutes contained no anti-waiver provisions such as those contained in the Securities

Act and the Securities Exchange Act. The Third Circuit's reasoning is defective. The arbitrability of RICO can only be manifested from the intent of Congress as expressed in RICO and its legislative history. By looking to the mail and wire fraud statutes which afford no civil action and by ignoring the purpose of Congress expressed in enacting RICO, the Third Circuit strayed from the analysis dictated by this Court in *Mitsubishi*, 87 L.Ed.2d at 456.

The Fifth Circuit is the only Court of Appeals to hold that all RICO claims are arbitrable. *Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986). It is from this holding that Cross-Petitioners appeal. The Fifth Circuit, reasoning from the legislative history, found that § 1964(c) was primarily intended to serve a private function. The Fifth Circuit's review of RICO's legislative history is fatally flawed by its failure to consider Congress' "Statement of Findings and Purpose" which accompanied the statute.

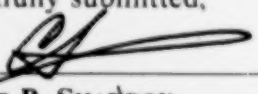
The Court of Appeals would permit racketeers to negotiate agreements to arbitrate their future criminal acts. Because the appointment of arbitrators is often controlled by the disputing parties, those who engage in racketeering activities would tend to choose arbitral proceedings over those governed by an impartial judiciary. Plaintiffs, who have belatedly discovered that they were injured by persons who have fearlessly transgressed the criminal laws, would be asked to present their claims to an arbitral body whose independence is at best uncertain. Such a procedure would mock the stated congressional purpose of the eradication of organized crime.

Conclusion

The decision of the Fifth Circuit conflicts with decisions of all other Courts of Appeal which have considered the issue and raises a question of general importance in the enforcement of the

criminal laws. This Cross-Petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,



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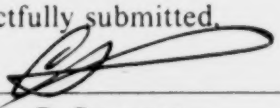
Certificate of Service

I, Charles R. Shaddox, Counsel of Record for Cross-Petitioners, hereby certify that on today's date, Monday, February 16, 1987, six copies of the Cross-Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit with regard to the above-styled case have been deposited in the United States Mail, with sufficient first class postage affixed thereto, with three copies sent addressed to Mr. Theodore A. Krebsbach and Mr. Jeffrey L. Friedman, Office of the General Counsel, Shearson Lehman Brothers, Inc., Two World Trade Center, New York, New York 10048; and three copies sent addressed to Mr. William D. Sims, Jr. and Mr. Will S. Montgomery, Jenkens & Gilchrist, 3200 Allied Bank Tower, Dallas, Texas 75202-2711, counsel for Cross-Respondents. I further hereby certify that all parties required to be served have been served.

Respectfully submitted,



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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAYAJA, INC., S.A. ORART, ELIAS SHEINBERG, and MARCIA SHEINBERG,
Plaintiffs-Appellees,

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE, and SHEARSON LEHMAN BROTHERS, INC.,
Defendants-Appellants.

No. 85-2762

OPINION

Filed October 24, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Western District of Texas
H. F. Garcia, District Judge, Presiding

SUMMARY

Abritration/RICO/Securities

Appeal from a decision denying a motion to compel arbitration of securities fraud claims and RICO claims. Affirmed in part, reversed in part and remanded.

Plaintiffs brought suit against defendants Shearson Lehman Brothers, Inc. (Shearson), a Shearson manager, and the manager's supervisor based upon a series of transactions involving plaintiffs' financial management and commodity accounts with Shearson. Plaintiffs assert claims of securities fraud under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act) and under Rule

10b-5 of the Securities and Exchange Commission. They also assert civil RICO claims based upon predicate acts of mail and wire fraud as well as upon the acts of securities fraud independently asserted. Defendants filed a motion to compel arbitration, which the district court denied.

[1] Agreements to transact in commodities futures and securities involve interstate commerce, which makes the Federal Arbitration Act applicable to the instant proceeding, and **[2]** the arbitration clauses involved here encompass the claims asserted. Both the 1934 Act claims and the RICO claims arise out of or relate to the plaintiffs' accounts or transactions with Shearson. **[3]** In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, the party opposing the motion to compel must produce evidence that Congress intended the statutory claim to be non-arbitrable. **[4]** Based on the anti-waiver provision of the 1934 Act, Fifth Circuit cases have consistently held that Congress intended 1934 Act claims to be non-arbitrable. **[5]** Although defendants argue that recent Supreme Court decisions have implicitly overruled this established precedent, absent a clear statement from the Supreme Court, the confirmed precedent will not be upset. **[6]** As to the RICO claims, RICO contains no anti-waiver provisions similar to those of the 1933 and 1934 securities acts. **[7]** The primary purpose of section 1964(c), RICO's private treble-damages provision, is to compensate those inujured by organized crime; the section's secondary purpose is to deter racketeers from inflicing such injuries. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will be served by arbitration. **[8]** This case presents another instance when, instead of being used against mobsters and organized criminals, section 1964(c) has become a tool for everyday fraud cases against respected and legitimate enterprises. The claims presented as a whole are the kind of claims for which the Commodity Futures Trading Commission has enacted extensive regulations governing arbitration. In this type of case, the congressional purpose of compensation and deterrence underlying section 1964(c)—to the extent that any considerations of deterrence are present—may be fulfilled by arbitration. Thus, the RICO claims must be submitted to arbitration under the Federal Arbitration Act.

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

I.

In July of 1985, plaintiffs Mayaja, Inc. (Mayaja), Orart S.A. Texas, Inc. (Orart), and Elias and Marcia Sheinberg brought suit against defendants based upon a series of transactions involving their financial management and commodity accounts with defendant Shearson Lehman Brothers, Inc. (Shearson). Both Mayaja and Orart are closely-held private corporations whose officers and directors are members of the Sheinbergs' family. Mayaja and Orart allege that defendant Bustamante, the manager of their discretionary commodity accounts with Shearson, conducted a number of unauthorized transactions on the accounts with the complicity of his supervisor, defendant Bodkin, resulting in staggering losses. The Sheinbergs allege that Bustamante forged their signatures and withdrew money from their financial management account in order to meet margin calls on the commodity accounts of Mayaja and Orart. The plaintiffs assert against defendants claims of securities fraud under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission. Plaintiffs also assert civil RICO claims based upon predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, as well as upon the acts of securities fraud independently asserted.[1]

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[1] *See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1964(c), 1962 & 1961(1). Section 1964(c) provides treble damages for persons injured by RICO violations:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Section 1962, in turn, describes the activities that RICO prohibits:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has par-

Defendants responded to the complaint with a motion to compel arbitration. Plaintiffs had agreed to arbitrate "any controversy arising out of or relating to [their] accounts, to transactions with [Shearson] . . . or to [their] agreement[s] or the breach thereof" when they signed their respective agreements.[2] The defendants

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ticipated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962. Finally, section 1961 defines the key phrases "racketeering activity" and "pattern of racketeering activity":

As used in this chapter —

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . or (D) any offense involving . . . fraud in the sale of securities . . . .

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(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

18 U.S.C. § 1961(1), (5).

[2] Paragraph 13 of the Customer's Agreement signed by Elias and Marcia Sheinberg reads in pertinent part:

Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with [Shearson]

argued that the Supreme Court's decisions in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), and in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), implicitly overruled established precedent in this circuit holding that securities fraud claims under the 1934 Act are not arbitrable. *E.g., Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Defendants also asserted that these same Supreme Court decisions argue for the arbitrability of the RICO claims.

The district court found that the Court's opinions specifically declined to address the question of the arbitrability of 1934 Act claims. Holding that Justice White's suggestion that 1934 Act claims may be arbitrable, contained in his concurring opinion in *Byrd*, was insufficient to overcome established precedent in this circuit, the court below denied the motion to compel arbitration.

On appeal of the order denying the motion to compel arbitration,[3] we affirm in part and reverse in part.

> for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.

Supplemental Record on Appeal at 7.

The Commodity Account Agreements signed by Mayaja and Orart contained, as an addendum, a separately signed Arbitration Agreement that reads in part as follows:

> Any controversy arising out of or relating to the Corporation's account, to transactions with [Shearson] for the Corporation or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the New York Stock Exchange, Inc. or of the American Arbitration Association Inc., as the Corporation may elect. . . .
>
> While the Commodity Futures Trading Commission (CFTC) encourages the settlement of disputes by arbitration, it requires that your consent to such an agreement be voluntary. You need not sign this Arbitration Agreement to open an account with Shearson. (See 17 CFR 180.1-180.6)

Id. at 14, 19.

[3] We note jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1). An appeal of an order denying a motion to compel arbitration

II.

This appeal presents the question of whether, under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, plaintiffs' securities fraud and RICO claims must be submitted to arbitration. Like any decision whether to order arbitration under the Act, the inquiry in this case divides into two broad parts: first, did the parties agree to arbitrate the disputes in question, and, second, did Congress intend that the claims *sub judice* be arbitrable? *See Mitsubishi*, 105 S. Ct. at 3354, 3355. Accordingly, we first examine whether plaintiffs' arbitration agreements encompass the statutory claims asserted; in Part III we consider the arbitrability of these claims.

[1] As a preliminary matter, we note that the contracts before us involve "commerce" within sections 1 and 2 of the Act sufficient to bring sections 3 and 4 of the Act into play. Agreements to transact in commodities futures without question involve interstate "commerce" as that term is defined in section 1,[4] and an agreement

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falls within the purview of the decrepit *Enelow-Ettelson* rule, recently reiterated by this court as follows:

> "An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim."

Tenneco Resins, Inc. v. Davy Int'l, AG, 770 F.2d 416, 418 (5th Cir. 1985) (quoting *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962)) (emphasis in original); *see Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). It is clear that the securities fraud and RICO claims are legal causes of action. *See Cobb v. Lewis*, 488 F.2d 41, 46 (5th Cir. 1974) (claims for damages under securities fraud and antitrust laws are legal claims); *see also Byrd*, 105 S. Ct. 1238 (taking jurisdiction, without discussion, of appeal of order denying motion to compel arbitration in context of securities fraud claims). Since a stay pending arbitration is an equitable defense, *Tenneco Resins*, 770 F.2d at 419, the order appealed *sub judice* falls within the *Enelow-Ettelson* rule and is appealable.

[4] "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

to transact in securities is no less interstate in nature. Having determined the applicability of the Arbitration Act to the instant proceeding, we now pause to consider whether "the issue involved in [this] suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3.

[2] We find that the arbitration clauses before us encompass the claims asserted in this dispute. Both the 1934 Act claims and the RICO claims "aris[e] out of or relat[e] to" the plaintiffs' accounts or transactions with Shearson: the securities fraud allegations and the other acts predicate to the RICO claim all derive from Shearson's handling of the plaintiffs' accounts or from transactions on those accounts made by Shearson's agents. Bearing in mind the federal policy that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), we find it clear that the parties agreed to arbitrate these claims. *Cf. Mitsubishi*, 105 S. Ct. at 3353 n.13 (construing more restrictive arbitration clause as encompassing arbitration of antitrust claims). We now turn to consider whether plaintiffs' 1934 Act and RICO claims are non-arbitrable even though they have agreed to arbitrate them.

III.

[3] In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, *Moses H. Cone*, 460 U.S. at 24-25, it is necessary that the party opposing the motion to compel produce evidence that Congress intended the statutory claim to be non-arbitrable. *See Mitsubishi*, 105 S. Ct. at 3355. A mere absence of evidence that Congress intended the claims to be arbitrable is insufficient to overcome the presumption in favor of arbitrability; the party opposing the motion must show that Congress intended to make an exception to the Arbitration Act of the statutory claim in question. As the Supreme Court instructed in its *Mitsubishi* opinion:

Federal Arbitration Act, 9 U.S.C. § 1. Section 2 of the Act provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable .... We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

Id.

Thus, the task of a court in determining the arbitrability of a claim under the Federal Arbitration Act is, first, to examine the relevant statutory text and legislative history for express evidence that Congress intended the statutory claim concerned to be non-arbitrable. In many cases Congress may not have explicitly addressed the arbitrability question. In this event, the court must carefully examine the *congressional* policies prompting the enactment of the cause of action to determine whether, in light of these policies, an implicit congressional intention that the claims under the statute not be subjected to arbitration may be inferred due to the inability of these policies to be furthered if the claims are subject to arbitration. *See Mitsubishi*, 105 S. Ct. at 3357-59 (examining, in the absence of an explicit statement of congressional intent as to arbitrability, congressional policies behind § 4 of the Clayton Act); *cf. McDonald v. City of West Branch*, 104 S. Ct. 1799, 1803-04 (1984) (basing finding of congressional intent that § 1983 claims be non-arbitrable upon conflict between arbitration and § 1983's objectives); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-45 (1981) (finding congressional intent that FLSA claims be non-arbitrable because of conflict between arbitration and FLSA's purposes); *Alexander v. Garner-Denver Co.*, 415 U.S. 36, 56 (1974) ("The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.").

With these rules of statutory interpretation in mind, we turn to the questions of whether Congress intended that 1934 Act and pri-

vate RICO claims be litigated in factual settings similar to that of the case before us.

A.

[4] This court has on many occasions addressed the question of the arbitrability of 1934 Act claims, and consistently held that Congress intended these claims to be non-arbitrable. *See, e.g., Bustamante v. Rotan Mosle, Inc.*, No. 86-2300, slip op. 339, 340 (5th Cir. Oct. 17, 1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1275 n.1 (5th Cir. 1986); *Sawyer v. Raymond, James & Assocs., Inc.*, 642 F.2d 791, 792 (5th Cir. Unit B 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Basing their decisions upon an extension of the Supreme Court's analysis of the anti-waiver provision of the Securities Act of 1933 in *Wilko v. Swan*, 346 U.S. 427 (1953), these opinions found the similar anti-waiver provision of the 1934 Act to expressly preclude arbitration of the private cause of action that Congress implied in section 10(b) of the 1934 Act. *See, e.g., Sibley*, 543 F.2d at 543 n.3.

[5] Defendants argue that the Supreme Court's decisions in *Mitsubishi* and in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), implicitly overrule our established precedent. As this court recently held in *Bustamante v. Rotan Mosle, Inc.*, neither of these Supreme Court opinions addressed the question of the arbitrability of 1934 Act claims. No. 86-2300, slip op. at 340-41 (5th Cir. Oct. 17, 1986). We agree with *Bustamante* and four other circuits that, absent a clearer statement from the Court as to the arbitrability of 1934 Act claims, we must abide by the confirmed precedent of our circuit. *Id.*; *accord Wolfe v. E.F. Hutton & Co., Inc.*, Nos. 85-3352, 85-5419 (11th Cir. Sept. 29, 1986) (en banc); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) (finding, as a matter of first impression, 1934 Act claims to be non-arbitrable); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44). *Contra Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986). We therefore hold that the district court did not err in refusing to compel arbitration of the 1934 Act claims.

B.

The question of whether private RICO claims may be arbitrated is of first impression in this court.[5] Both the Second and Third Circuits have ruled on this question: the Second Circuit holding that private RICO claims may never be arbitrated, and the Third Circuit holding that such claims may be arbitrated when the offenses predicate to the required "pattern of racketeering activity" are arbitrable. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (86-44); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986). We hold that, at least in the context of claims like that *sub judice*, private RICO claims must be arbitrated under the Federal Arbitration Act.[6]

(*Text continued on page 682*)

[5] A panel of this court briefly addressed, in dicta, the question of the arbitrability of private RICO claims. *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-82 (5th Cir. 1986). On petition for rehearing and suggestion for rehearing en banc, the panel noted that its reasoning on the RICO issue was seriously called into question by *Mitsubishi*. *Id.* at 1282. The panel therefore amended its opinion "to refuse to decide the arbitrability *vel non* of the plaintiffs' RICO claim." *Id.*

[6] We recognize that our decision accords neither with *McMahon* nor with *Jacobson*, further adding to the split already present among the circuits. *McMahon*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *Jacobson*, 797 F.2d 1197 (3rd Cir. 1986) (2-1 decision). We respectfully cannot agree with the reasoning of either of these two opinions.

McMahon based its holding that RICO claims can never be arbitrated on "strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute." 788 F.2d at 99. The policy concerns mentioned by the court were developed by analogy to *American Safety Equip. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968), a Second Circuit opinion banning arbitration of antitrust claims. *American Safety* argued that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest." 391 F.2d at 826. *McMahon* held that comparable concerns inherent in the enforcement of RICO claims precluded their arbitration. 788 F.2d at 98.

We decline to follow *McMahon* because, as the Third Circuit noted, "the *McMahon* court paid too little deference to the Supreme Court's decision in *Mitsubishi*." *Jacobson*, 797 F.2d at 1202. *McMahon* ignores *Mitsubishi*'s instruction that congressional intent governs the analysis of arbitrability of a statutory claim under the Arbitration Act. After *Mitsubishi*, "determining stat-

utory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Id.* Since *McMahon* does not base its decision on a statutory interpretation of section 1964(c), we cannot follow its analysis. Moreover, we find *McMahon*'s reliance on *American Safety* misplaced. Although the Supreme Court did not explicitly overrule *American Safety* in the domestic context, *Mitsubishi* rejected so much of *American Safety*'s reasoning it is difficult to say what is left of the opinion to rely on. *See Mitsubishi*, 105 S. Ct. at 3357-60. Certainly the Court rejected that portion of *American Safety*'s reasoning relied upon by *McMahon*. *See id.* at 3359 ("Notwithstanding its important incidental policing function. . . . § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury.").

On the other hand, we must also respectfully decline to follow the reasoning of the Third Circuit. *Jacobson* defined the relevant field of statutory interpretation as consisting of (or at least including) the predicate statutes necessary for a section 1964(c) action: "Because of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi*, look to those statutes as well." *Jacobson*, 797 F.2d at 1202. In fact, *Jacobson* did not examine section 1964(c)'s text or legislative history, instead relying exclusively upon the text of predicate statutes. *See id.* at 1203. Following precedent holding 1934 Act claims to be non-arbitrable, *Jacobson* ruled that RICO claims based on predicate violations of the 1934 Act were not subject to arbitration. *Id.* Finding no indication of a congressional intent to make violations of the federal mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1342, non-arbitrable, however, *Jacobson* held that RICO claims founded upon these predicate statutes were arbitrable. 797 F.2d at 1203.

We find, however, that a claim under section 1964(c) is logically discrete from claims under its predicate statutes. As Judge Adams observes in his dissent from the majority opinion in *Jacobson*:

> A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

Jacobson, 797 F.2d at 1209 (Adams, J., dissenting). Judge Adams also notes that the difference between the RICO action and its predicate violations is demonstrated by the structure of the RICO statute. Unlike any individual predicate offense, RICO proscribes the operation of any "enterprise" engaged in or whose activities affect interstate or foreign commerce, using income derived from a "pattern of racketeering activity." *Id.* (citing 18 U.S.C. § 1962). "Pattern of racketeering activity" is defined as at least two violations of any predicate

[6] As the Third Circuit pointed out, RICO contains no anti-waiver provision similar to those of the 1933 and 1934 securities acts. *Jacobson*, 797 F.2d at 1202. In the instant case, the congressional intent as to the arbitrability of private RICO claims cannot be ascertained from the text of the statute. We turn, then, to the legislative history for guidance.

Added to the House version of the bill after the original bill had been passed by the Senate, the private treble-damages provision later codified as section 1964(c) received relatively little discussion in either house of Congress. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3280 (1985). The congressional discussion of the treble-damages provision did not touch upon the arbitrability of

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statute within a ten-year period. 18 U.S.C. § 1961(5). Section 1964(c) further adds the requirement that the plaintiff asserting a private RICO action have been injured by the "enterprise" as a result of such "racketeering activity." Thus, by its very structure, the RICO claim is distinct from its predicate offenses.

Judge Adams criticizes the majority opinion in *Jacobson* for splitting a single RICO count when that count is predicated upon arbitrable and non-arbitrable offenses:

> [T]he result reached by the majority would divide that [single RICO] count in order to allow for arbitration of the mail and wire fraud issues and litigation in a court of the securities issues—despite the fact that the unique RICO offense depends, in this case, on whether the enterprise has engaged in mail and wire fraud *as well as* securities fraud within a ten-year period.

Id. at 1210 (emphasis in original). The fallacy in *Jacobson*'s reasoning is further pointed out by its handling of the mail and wire fraud issues. The majority opinion held that RICO claims predicated upon mail or wire fraud statutes are arbitrable because "[n]o provision of the mail or wire fraud statutes bears any similarity to the anti-waiver provision of the 1933 and 1934 securities acts." *Id.* at 1203. No such anti-waiver provision can be found in the mail and wire fraud statutes because these are *criminal felony* statutes; arbitration of a felony charge simply does not occur in our legal system. A court searching for congressional intent as to arbitrability in criminal statutes will always return with empty hands. Private parties such as the plaintiffs in this case do not have standing to bring suit under these statutes. Only through RICO's section 1964(c) do they have standing to invoke these mail and wire fraud statutes at all, and it is, logically, to RICO that courts must look to determine the arbitrability of their claims.

claims brought under the provision. *Accord Jacobson*, 797 F.2d at 1202. Since Congress has not expressly indicated its intent as to the arbitrability of these claims, we examine the congressional purposes underlying the enactment of section 1964(c) to determine whether, because of an inherent conflict between these purposes and the arbitration of the claims, Congress implicitly intended that all such claims be non-arbitrable.

Representative Steiger introduced the private treble-damages provision to the House Judiciary Committee as a primarily compensatory, and secondarily deterrent, measure:

> One possible amendment, for example, which I would raise for your consideration, would add a private civil damage remedy to title IX [the RICO subchapter of the Organized Crime Control Act], similar to the private damage remedy found in the anti-trust laws. Not every businessman, of course, will wish to take advantage of such a remedy, but those who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions.

Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) [hereinafter cited as *House Hearings*]. The American Bar Association independently proposed an amendment to RICO "authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." *Id.* at 544; *see also id.* at 559, 560 (identical proposal by ABA Section of Criminal Law).

While the bill was debated before the full House, several representatives referred to the private treble-damages provision. Representative Poff mentioned the provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. at 35,295 (1970); *see also id.* at 35,346 (Representative Poff noting that the provision "has its counterpart almost in haec verba in the antitrust statutes"). Representative Steiger asserted that "[i]t is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress.... It represents the one

opportunity for those of us who have been seriously affected by organized crime activity to recover." *Id.* at 35,346-47. Representative Mikva, referring to the treble-damages provision, proposed amending title IX of the bill to ensure that "we do not let some criminal law be abused by an overzealous competitor." *Id.* at 35,343. In proposing his amendment, which was rejected by the House, *id.*, Mr. Mikva noted the similarity of the treble-damages provision to the antitrust laws and implied that the purpose of the provision was compensatory. *Id.* at 35,342 (describing the private treble-damages provision as "sauce for the goose" injured by organized crime whereas his amendment provided "protection for the gander" that might be injured by frivolous suits brought by an aggressive competitor).

While the bill was pending in the House, Senator McClellan brought the attention of the Senate to the proposed treble-damages amendment. *Id.* at 25,190. Senator McClellan explained that the proposed amendment would "authorize private civil damage suits based upon the concept of section 4 of the Clayton Antitrust Act. This amendment, particularly, should prove, if accepted by the House, to be a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.* It is difficult to evaluate from his statement whether the senator regarded the treble-damages provision as a primarily compensatory or deterrent measure. While the word "extirpate," to root out, suggests a more deterrent connotation, the sentence's object, the "baneful influence of organized crime in our economic life," suggests that the wrong addressed by the provision is the economic damage caused by organized crime—a wrong more appropriately addressed by compensatory measures than by deterrent measures.

The House passed the bill with the treble-damages provision in the form proposed by the Committee. *Id.* at 35,363-64; *Sedima*, 105 S. Ct. at 3281. The Senate did not seek a conference, and adopted the bill as amended in the House. 116 Cong. Rec. at 36,296; *Sedima*, 105 S. Ct. at 3281.

The legislative history of section 1964(c) thus reveals three currents of congressional purpose. First, and perhaps foremost, is the congressional intention of compensating "the victims of organized crime." Second, the provision was intended to deter organized

crime by "enhanc[ing] the effectiveness of title IX's prohibitions." Finally, one notes that the most recurrent theme in the legislative history of the section is found in the repeated references to section 4 of the Clayton Act. Since these references to the Clayton Act could be argued to be an adoption by reference of the purposes of the Clayton Act's treble-damages provision, we survey the goals of the Clayton Act for further clarification of the congressional intent behind section 1964(c).

The Supreme Court in *Mitsubishi* thoroughly examined the legislative intent behind section 4 of the Clayton Act for the purpose of determining the arbitrability of section 4 claims. 105 S. Ct. at 3358-60. While acknowledging that "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," *id.* at 3358, the Court held that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at 3359. Emphasizing the priority of the role of treble damages as compensation over its role as enticement for private attorneys general, the Court noted that the antitrust cause of action remains at all times under the control of the individual litigant, and that the private antitrust plaintiff needs no executive or judicial approval before settling a treble-damages suit. *Id.* Because the deterrent function was secondary to the compensatory function, the Court concluded that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3359-60.

[7] *Mitsubishi*'s reading of the legislative purpose of section 4 of the Clayton Act, recurrently invoked during the congressional discussion of RICO's private treble-damages provision, accords with our analysis of the legislative history of section 1964(c). The primary purpose of the section is to compensate those injured by organized crime; the section's secondary purpose is to deter racketeers from inflicting such injuries. Paralleling *Mitsubishi*'s analysis, we find no evidence that Congress implied that all RICO claims be non-arbitrable. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will continue to be served.

[8] The case *sub judice* presents yet another instance when, "[i]nstead of being used against mobsters and organized criminals, [section 1964(c)] has become a tool for everyday fraud cases brought against 'respected and legitimate 'enterprises.' '" *Sedima*, 105 S. Ct. at 3287 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984)). The claims presented as a whole are the kind of claims for which the Commodity Futures Trading Commission has enacted extensive regulations governing arbitration. *See* 17 C.F.R. §§ 180.1-.5 (1986). In cases like that before us, the congressional purposes of compensation and deterrence underlying section 1964(c)—to the extent that any considerations of deterrence are present—may be fulfilled by arbitration of the plaintiffs' claims. We hold, therefore, that the plaintiffs' RICO claims must be submitted to arbitration under the Federal Arbitration Act.

IV.

The order of the district court denying defendants' motion to compel arbitration is AFFIRMED with respect to plaintiffs' 1934 Act claims; with respect to plaintiffs' private RICO claims the district court's order is REVERSED and REMANDED with instruction to compel arbitration in accordance with the Federal Arbitration Act and relevant agency regulations.

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APPENDIX B

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 85-2762

MAYAJA, INC.; ORART S.A. TEXAS, INC.;
ELIAS SCHEINBERG; and MARCIA SCHEINBERG

Plaintiffs-Appellees

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE,
and SHEARSON LEHMAN BROTHERS, INC.,

Defendants-Appellants

Appeal From the United States District Court for the Western District of Texas San Antonio Division

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APPELLANTS MOTION TO SUPPLEMENT RECORD

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS:

Appellants Joseph F. Bodkin, Nicolas Bustamante and Shearson Lehman Brothers, Inc. file this Motion to Supplement Record as follows:

1. Appellants request that this Court allow Appellants to supplement the Record with copies of the arbitration agreements on file with the United States District Court for the Western District of Texas, San Antonio Division ("District Court").

2. The issues in this appeal, which is set for oral argument on July 10, 1986, are whether claims brought under Rule 10b-5

and under RICO can be compelled into arbitration. For the first time on appeal, Appellees assert that the arbitration agreements between Appellees and Appellants were never actually introduced into evidence in the District Court. At no time while the case was pending in the District Court, did Appellees suggest that copies of the arbitration agreements needed to be introduced into evidence before the District Court ruled on Appellants' Motion to Stay and Compel Arbitration. Indeed, all parties briefed the arbitration issues on the assumption that arbitration agreements existed. Moreover, the District Court's Order denying arbitration was based on the assumption that arbitration agreements signed by the parties existed.

3. To satisfy Appellees' after-the-fact concern that the arbitration agreements were never introduced into evidence before the District Court, Appellants have filed in the District Court the arbitration agreements as exhibits to the Affidavits of Appellant, Nicolas Bustamante.

4. Appellants request that the present Record be supplemented with the Bustamante Affidavits and the arbitration agreements. If the Record is supplemented, Appellees can still make their argument that the arbitration agreements were not before the District Court when it issued its ruling; but at least this Court will know that (1) arbitration agreements did exist as the parties assumed in the District Court and (2) the District Court acted correctly when it assumed that arbitration agreements existed at the time it ruled upon Appellants' Motion to Stay and Compel Arbitration.

WHEREFORE, Appellants pray that the District Court grant this Motion to Supplement Record and direct that the District Clerk for the United States District Court for the Western District of Texas, San Antonio Division, prepare a Supplemental Record for this appeal with the Affidavits of Nicolas S. Bustamante containing the arbitration agreements, as well as any additional pleadings which Appelles choose to designate, and for such further relief as Appellants may show themselves to be entitled.

Respectfully submitted,

William D. Sims, Jr.
Will S. Montgomery

JENKENS, HUTCHISON & GILCHRIST
2200 InterFirst One
Dallas, Texas 75202
(214) 653-4500

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF CONFERENCE

I spoke by telephone with Charles Gorham, one of the Attorneys for Appellees, and he stated that he opposed supplementing the Record.

William D. Sims, Jr.

CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing motion has been forwarded by Federal Express and by certified mail, return receipt requested to Charles Gorham, Attorney for Appellees, this 4th day of June, 1986.

William D. Sims, Jr.

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 85-2762

MAYAJA, INC., ORART S.A. TEXAS, INC.,
ELIAS SCHEINBERG, and MARCIA SCHEINBERG

Plaintiffs-Appellees

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE,
and SHEARSON LEHMAN BROTHERS, INC.

Defendants-Appellants

Appellees' Response to
Appellants' Motion to Supplement the Record
and Brief in Support Thereof

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

Mayaja, Inc., Orart, S.A. Texas, Inc., Elias Sheinberg and Marcia Sheinberg, Appellees in this appeal and Plaintiffs below ("Plaintiffs") file this their response to the motion to supplement record of Joseph F. Bodkin, Nicholas S. Bustamante and Shearson Lehman Brothers, Inc., Appellants in this proceeding and Defendants below ("Defendants"):

1. On September 23, 1985 the District Court denied Defendants' motion to dismiss and compel arbitration.

2. On October 7, 1985 the District Court denied Defendants' motion to reconsider its order denying Defendants' motion to stay or dismiss and compel arbitration and amended motion to stay or dismiss and compel arbitration.

APPENDIX D

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 85-2762

MAYAJA, INC.; S. A. ORART,
ELIAS SHEINBERG; and MARCIA SHEINBERG

Plaintiffs-Appellees

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE,
and SHEARSON LEHMAN BROTHERS, INC.,

Defendants-Appellants

ORDER:

IT IS ORDERED that appellants' motion to supplement the record on appeal is GRANTED.

/s/ Thomas Gibbs Gee
UNITED STATES CIRCUIT JUDGE

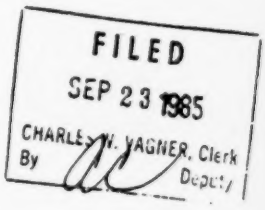
APPENDIX E

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION



SA-85-CA-2051

MAYAJA, INC. *et al,*

Plaintiffs

v.

JOSEPH F. BODKIN, *et al,*

Defendants

ORDER

On this day came on to be considered defendants' motion to dismiss and compel arbitration. The Court finds plaintiffs' allegations to be sufficiently specific to comply with Rule 9(b) F.R.Civ.P. Arbitration of the federal securities claim will be denied based upon the established law in the Fifth Circuit. *See, Smokey Greenhaw Cotton Co., Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 720 F.2d 1446, 1448 (5th Cir. 1983). Defendants argue that claims brought pursuant to the 1934 Act, are subject to arbitration since the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd,* ____ U.S. ____, 105 S.Ct. 1238 (1985). Among other authorities, a recent order from the Austin Division of this district is cited in support of defendants' position; this Court is of the contrary opinion. The Supreme Court in *Byrd,* 105 S.Ct. at 1240, n.1, specifically stated that the issue of the arbitrability of 1934 Act claims was not before it. The suggestion in the concurring opinion of Justice White that such claims are arbitrable is insufficient to overcome clearly established Fifth Circuit precedent.

It is therefore ORDERED that defendants' motion to dismiss and compel arbitration is DENIED.

SIGNED this 20th day of September, 1985.

H. F. GARCIA

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

SA-85-CA-2051

MAYAJA, INC., *et al,*

Plaintiffs

v.

JOSEPH F. BODKIN, *et al,*

Defendants

ORDER

On this day came on to be considered defendants' motion to reconsider order denying defendants' motion to stay or dismiss and compel arbitration and amended motion to stay or dismiss and compel arbitration . The Court has considered same and is of the opinion that it should be in all things DENIED.

It is so ORDERED.

SIGNED this 7th day of October, 1985.

H. F. GARCIA
United States District Judge